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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THOMAS CHRISTIANSON, Plaintiff in Error, vs. THE COUNTY OF KING, Defendant in Error,	ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION. HON. FRANK H. RUDKIN, Judge.

Reply Brief for Plaintiff in Error

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Reply Brief for Plaintiff in Error

TO THE HONORABLE JUDGES OF SAID CIRCUIT COURT OF APPEALS:

There are some matters contained in the brief of defendant in error which we think require further comment on our part.

FIRST

Counsel dispute our statement that it is necessary that there should be an inquest of office to terminate the presumption of heirship before property can fully escheat to the sovereign. In support of their view, they cite certain cases, the language used in which would seem at first glance to hold as they contend, but a careful examination of all the authorities will show that they can be divided into two classes, the difference between which consists in who is the person raising the question of the sufficiency of the sovereign's title by escheat. If a person dies and no heirs appear upon the scene, the sovereign has a perfect right to take possession of the property as against all others, except those claiming under the decedent, and take care of the property until in due course of law an inquest of office can be had, and then after such inquest of office, the title of the sovereign is good as against the whole world, including the heirs of the decedent, the presumption of whose existence has been destroyed by the inquest of office. If a careful examination is made of the cases (and we have tried to make one), we think it can be safely stated that in every case where it has been held that no inquest of office was necessary, it has been some person

claiming under a strange title who was contesting the title by escheat, and it was held that the sovereign or the person claiming under him, could establish the title by escheat by proving the non-existence of heirs without showing that there had been office found. But in every single case where the person challenging the title by escheat has been the heir (as in the case at bar), or someone claiming under him, it has been held that an inquest of office was necessary.

We are indeed astounded at counsel's citation in support of their contention of the case of Hamilton vs, Brown, 161 U. S. 261 (their brief page 36). They quote the exact language which sustains our position, and which we would have quoted had we not deemed that we had presented the Court with sufficient authorities upon this question. In the quotation that counsel have made, it is expressly held that at common law, the king's title was not complete without judicial proceedings to ascertain the want of heirs and devisees. The court then proceeds to describe what was the method of procedure in an inquest of office, and it then says: "In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation

of law, or upon an inquest of office, according to the law of the particular state."

This simply amounts to saying that a state has a right to abolish inquest of office if it sees fit; that if the state law provides for inquest of office, it must be had, and if the state law is silent upon the subject, and the common law is in force in that state, then also an inquest of office must be had. In the Territory of Washington, there was a law providing that proceedings to escheat property should be brought by the prosecuting attorney by an information filed in the district court and so under the law as laid down by the Supreme Court of the United States in said case of Hamilton vs. Brown, an inquest of office in pursuance of such statute was necessary. Counsel claim that this statute was repealed (which we dispute), but if that were so, they would be in no better position since the common law was in force in the territory, and if this statute were repealed, such common law would be in full effect as no other procedure was substituted for the one which they say was abolished.

But this statute which prescribed a procedure for the escheats never was repealed. The statute of 1854 provided that an information should be filed by the prosecuting attorney in the district court

"whenever any property shall escheat or be forfeited to the territory for its use". The law of 1862 to which counsel refer was a revision of the Civil Practice Act, and when it came to this subject matter (Section 519 of the later act) it simply left out the words "escheat or", leaving the law to read "whenever any property shall be forfeited to the territory for its use". Technically there is a difference between the meaning of the words "escheat" and "forfeiture", though the word "forfeiture" as used in the vernacular includes both. The Supreme Court of Montana in Territory vs. Lee, 2 Mont. 124, and the Supreme Court of the United States in Church etc. vs. United States, 136 U. S. page 1, use the words as though they were synonomous, and so do many of the other courts. If this court holds that the word "forfeiture" is broad enough to include both, then of course the Act of 1862 is simply a repetition, a re-enactment of the law of 1854, and this doubtless is what the legislature meant. Counsel in their brief (page 54) say: "An escheat is not a forfeiture, nor analogus thereto". If they are right in this statement, then the statute of 1862 does not deal with the subject of "escheats" at all, and therefore as it is silent in regard to that subject matter, certainly does not repeal the previous matter on that subject passed in

1854. There is no specific repeal of the law of 1854, and the repealing clause which they cite does not in any manner help them. It reads: "All acts or parts of acts heretofore enacted upon any subject matter contained in this act, be and the same are hereby repealed". This does not designate any specific acts, but still leaves it open to construction as to whether the act in question or previous acts refer to the same subject matter or not. If the word "forfeiture" in the act of 1862 is broad enough to include escheats, then it was simply a re-enactment of the law of 1854. If it is not broad enough to include escheats, then the subject matter of "escheats" is not contained in the act, and therefore it does not repeal any previous law upon that subject, and the law of 1854 still remains in full force. But supposing that the law of 1862 by implication did repeal the law of 1854, it would then leave the common law in force in the territory and the county would find itself in the same position, in that an inquest of office would be necessary. We refer the court for this latter proposition, that an inquest was neccessary under the common law, to this very case of Hamilton vs. Brown which counsel have cited, and also to the other cases mentioned in our first brief.

SECOND

In our brief (page 41, et seq.) we contended that the whole of the probate proceedings in the territorial probate court were void, because the only pretended petition for letters of administration upon which the proceedings were based, was a written request from a couple of strangers to the court to appoint another stranger administrator. It was defective in law, in that it failed to state the decedent's residence, the existence of assets, the *situs* of assets, the intestacy of the decendent and the right of the appointee to the appointment. It was defective in all these respects, each one of which has been held a fatal defect in the authorities which we refer to in our first brief, and which are contained in Vol. 18 of Cyc, page 122. The probating of an estate is a proceeding *in rem,* and the petition which starts the proceeding, is what gives jurisdiction, and if it does not comply with the law, the whole of the proceedings are null and void. This is elementary. It is claimed by counsel that the validity of these proceedings cannot be attacked colaterally. In this they are certainly mistaken. We have not the book before us, but your Honors will find it laid down distinctly in the first chapter of Van Fleet on Coll-

ateral Attack, that all judicial proceedings are subject to colatteral attack where such attack is based upon the lack of jurisdiction upon the part of the court. This is almost always so where the lack of jurisdiction is that of the person, but it is so without any exceptions where the lack of jurisdiction is that of the subject matter, and in this point which we are making, we are attacking the court on the ground that it never obtained jurisdiction over the *rem*, which was the estate of Thompson. Had the court obtained jurisdiction, then we frankly admit this court could not inquire into the question of whether its proceedings were erroneous or not. Errors could only be corrected by appeal. But we are not seeking to correct any errors. We simply claim that the whole proceedings are an absolute nullity.

THIRD

Our contention (Brief page 53 et seq.) that all acts of the county in taking possession of this land infringed the constitutional inhibition against confiscation of property without making just compensation, has been completely misunderstood by counsel. They must have read it in terrible haste. They seem to think we were invoking a different clause

of the constitution referring to "due process of law". There is a portion of our brief where we claim that the proceedings in the probate court were not due process of law, but that proposition was not being discussed at this place. What we were claiming (and we have James Kent as an authority to back us up), was that any act that the County or its officers might do in court, out of court, with their hands, their feet, their tongues, or in any manner whatever, or in any place whatever, the purpose or object of which was to get possession of this land and appropriate the same to the county's use, would be absolutely null and void and of no legal effect, and no rights could be based or predicated upon it, because it was in disobedience of the provision contained in the Fifth Amendment to the United States constitution forbidding the taking of private property for public use without making just compensation; and for a private use, certainly the County had no right to take it.

FOURTH

We feel it our duty to call attention to some of the very peculiar things as they appear to us, in counsel's brief.

1. On page 13, they boldly state that every

territory has passed acts assuming to appropriate escheated property to itself. We cannot admit this to be correct. If such laws have been passed and held valid by courts of competent jurisdiction, it is incumbent upon counsel to refer us to the cases. We cannot take their word for it, particularly as in this connection they boldly cite the case of Territory vs. Klee, 1 Wash. 183 as sustaining the power of the territorial legislature to enact laws upon the subject of escheats. In this case, instead of so doing, the court does not pass upon the question at all, but evades it, and expresses a doubt whether it is so. The case went off upon another point as to what county an administration should be taken out in. After disposing of the case upon that question, the court refers to the question we are discussing as follows:-

"But we will here state that we are of the opinion that IF THE TERRITORY IS THE OWNER OF THE LAND, the title vested in it immediately on the death of Gilbert, without the aid or intervention of the probate court" And in that case it can recover the possession of the land, like any other owner, by an appropriate action in the proper court"

It will thus be seen that instead of deciding what counsel say it does, the Supreme Court of Washington in this case expresses a doubt as to

whether the land would escheat to the territory. Besides, this decision is an additional authority that an inquest of office is necessary before the title could completely vest.

2. On page 9 of their brief, and at other places they cite the allegations of the original complaint in this case as though such allegations were admitted facts now before the court. This is certainly novel. We do not understand it. We had always supposed as a matter of law that when an amended complaint was filed, it took the place of the original, and that from that time on the original complaint was out of the case.

3. On page 75 of their brief, counsel seriously argue to this court that it should apply to the decree of the territorial probate court entered in 1869, a statute of the state of Washington passed in 1907. We do not know how to answer this kind of a contention.

4. At another place, counsel invoke the protection of the so-called seven years' statute of limitations which requires the existence of three elements to constitute a bar: (1) color of title; (2) possession, and (3) payment of taxes. Of course we claim there is no color of title but it is indisputable that

there never was any payment of taxes by the defendant. This court can no more apply the bar of this statue with one of the elements lacking, than it could amend the statue by adding an additional element not therein mentioned.

5. On page 7 of their brief, and on pages 70 and 71, counsel admit that they are going outside of the record. In many other places they do it without saying anything about it, but here they admit it. What does this mean? The writer was deputy clerk of the Supreme Court of Illinois in 1879 sitting at Ottawa when that Court sent for an attorney to come down from Chicago, and after severely reproving him for having submitted a brief nearly one-half of which was outside of the record, told him that if he ever repeated the offense, they would disbar him. We know that in the heat of advocacy, counsel will sometimes stray, but to do it deliberately passes our comprehension.

Of the same character are the slurs and covert insinuations on pages 73-74. It is certainly a peculiar style of argument to cast reflections upon the existence of facts which are admitted by demurrer.

6. Counsel's pathetic complaint because the County has lost 43 years' taxes is laughable. The

income and benefit derived from this property by the County in the last year would from fifty to one hundred times over pay all the accumulated taxes of the whole 43 years since the estate of Torgerson alias Thompson, was closed out and the County took control of the property.

Equally laughable is counsel's talk about the ancient and stale claim and litigation over ancient lineage. All the transactions involved in this case have occurred within the lifetime of all of your Honors. The plaintiff belongs to the next generation of his family following that of the decedent, being a son of his sister and old enough so that as a little boy he could well remember his uncle before he left home. But we must check ourselves and not be provoked into following counsel's bad example of going outside of the record.

Respectfully submitted,

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